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Federal Communications Commission 745-5664
Office of the Secretary

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May 26, 1992

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VIA FEDERAL EXPRESS

Federal Communications Commission
Secretary's Office
Room 222
1919 "M" Street, N.W.
Washington, D.C. 20554
Attention: Donna Searcy

Re: In the Matter of The Telephone Consumer Protection
Act of 1991
CC Docket No. 92-90

Pursuant to my secretary's conversation with Jane in your office today, please find enclosed nine copies of comments to the Notice of Proposed Rulemaking regarding the Telephone Consumer Protection Act of 1991 adopted April 10, 1992. The original comments were mailed via Federal Express by the undersigned on May 22, 1992 and should be in your office today. Please forward the enclosed copies to the appropriate personnel.

Very truly yours,

Kelly K. Kordzik

KKK/grh

Enclosures

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COMMENTS TO THE NOTICE OF PROPOSED RULE-MAKING BY
THE FCC ON THE TELEPHONE CONSUMER PROTECTION ACT OF 1991
CC DOCKET NO. 92-90

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Autodialers

In paragraph (b)(8) of the Notice of Proposed Rulemaking, it is stated that "[a]utodialer calls are prohibited to: residential telephone lines without the consent of the called party. . . ." With all due respect, this is an incorrect statement in that "autodialers" or "automatic telephone dialing systems" as defined within section 227 of the TCPA are equipment which has the capacity to store or produce telephone numbers to be called, using a random or sequential number generator; and to dial such numbers. Autodialers do not include artificial or pre-recorded voice messaging. It is permitted within the TCPA to use autodialers to contact residential telephone lines. Section 227(b)(1)(B) states that it is prohibited "to initiate any telephone call to any residential telephone line using an artificial or pre-recorded voice to deliver a message without the prior express consent of the called party, unless the call is initiated for emergency purposes or is exempted by rule or order by the Commission under paragraph 2(B)." It is misleading to refer to "autodialers" throughout the Notice of Proposed Rulemaking as also including computerized or pre-recorded voice messaging. FCC MAIL ROOM

Separately, "random or sequential number generator" should be limited to those devices which produce random or sequential numbers through means such as a computer algorithm and should not include those instances where telephone numbers are obtained from a list, such as a telephone book, and then these numbers are dialed in a random fashion or in a sequential manner.

The ban against artificial or pre-recorded voice messaging to residential telephone lines is not the best or most efficient method for controlling unsolicited phone calls. The legislators should have considered more alternative methods to obtaining their objective of eliminating the annoying and sometimes unsafe practice of soliciting residential telephone lines with voice messaging systems. The most efficient system would have been to provide the called party with enough information about a calling party so the called party can make a screening decision. Ideally this would occur before the phone rings. This function is feasible with current technology.

Some background is now offered in support of this alternative. There is a third type of call placing method called predictive dialing, as opposed to random or sequential dialing. This type of calling system is becoming increasingly popular with telemarketing and collection agencies. A predictive dialer is designed specifically for automatically placing calls for live agents. It calls from a pre-selected list of phone numbers, automatically placing and monitoring each call without live

intervention. The call is connected to an agent only if it is answered by a live person. No-answer, busy, and answering machine calls are automatically screened from the agent so the agent's time is utilized efficiently. The agent does not waste time listening to a ringing or busy signal. Even though the phone numbers are dialed automatically, this system is not an autodialer as described in the pending regulations as it does not deliver its message using a recorded voice. A live agent provides the conversation on the call.

This type of system has become popular because by screening no-answer, busy, and answering machine calls, the system can easily double or triple a calling agent's productivity. An agent calling normally will talk to 20 or 25 callers in an hour, and spend the remaining time listening to ringing or busy signals. With a predictive dialer, the agent can talk to 30 to 50 callers in an hour and never hear a ringing signal or an answering machine because they have been screened out by the system.

However, this type of system has one unusual characteristic. In order to gain the productivity, the system must place more simultaneous calls than there are actual agents. This causes the occasional possibility that a placed call will be answered and all of the agents will be busy on other calls. The industry has devised three different methods to handle this condition.

Method one, called "Hold Mode" has the system ask the called party to hold briefly until a live agent is free to talk to them. This method has been successfully used primarily in collection operations for ten years. Method two, called the "Drop Mode", simply hangs up on the called party if there are no free agents available when they answer. This method has been used extensively in telemarketing applications for 6-7 years. Method three, called the "early Drop Mode" will disconnect the ringing call before the customer answers if all agents are busy. This mode has only begun to be used in systems recently. It is an improvement over the standard drop mode because the calls that are dropped before answer are not billable to the caller as a result of the new metered local call billing.

The predictive dialer can be set to allow the "all busy" condition to occur only rarely, 1%-2% of the time. However, if the agents are not busy most of the time, productivity drops off, with the agent experiencing long idle times between calls. Therefore, the manager of a predictive dialing system must make a trade-off between agent productivity and held or dropped calls. The system manager can opt for low hold and drop rates at the cost of lower agent productivity. Alternatively, the manager can obtain high agent productivity (where the agent is talking to someone almost 100% of the time) with the trade-off of higher hold times or more dropped calls.

The TCPA legislation did not consider this type of equipment in the original rule-making. However, it is believed that this type of equipment will become the dominant method for call placing using live agents in the future because of the large productivity gains it make possible. Other non-predictive methods for outbound call placement such as "speed dial" or "preview dial" can only provide marginal productivity gains in comparison to predictive dial.

However, the most benign mode of the three predictive call modes, the "hold" mode, would be prohibited by the current proposed rules except by prior consent. This is because it plays a pre-recorded "hold" message briefly on some of the calls before connecting the live agent.. This was not the original intent of the legislation, as the hold mode is intended to deliver a live call. The result is that only "Drop" or "Early Drop" Modes are legal for non-consent calls. This means that to obtain the productivity a call center needs to be competitive in the marketplace for life telemarketing calls, the call center will use one of the "Drop" modes, and "no-on-there" calls will become commonplace during telemarketing campaigns.

It would be more appropriate to require either a pre-recorded hold message or an immediate live answer for all live telemarketing calls. The Drop modes currently in use could be restricted completely or only allowed by prior consent, although the new metered local rates will make this method less attractive. The content of hold message should be strictly defined, requiring the immediate identification of the call type and the calling party. Legally defined call types would be: Emergency, Business Relationship, Telemarketing, Collections, Polls, Non-Profit, etc. This would give the called party enough information to decide quickly whether to accept the call or hang up. In addition, the calling party could be required to provide an electronic tone after answer that encodes the call type. A simple addition to the basic answering machine could be designed to detect this tone and screen certain types of calls that are selectable by the user. This screening functionality could be provided in answering machines for a nominal increase in cost. If these identifying tones were required to be provided by call centers, the answering machine industry would respond quickly with screening features.

This live call screening by the called party will eventually become unnecessary when Automatic Number Identification (ANI) is available to consumers on a general basis. The technology exists today to build advanced answering machines that will screen calls by calling party phone number if the Calling Party ID was provided to the terminating instrument. However, the ideal situation would have all phone numbers include a type ID as a second field, so screening algorithms would be greatly simplified. When a typical residential phone line is ordered, the line would be

classified as personal, and any call placed by that phone would be identified as such. Telemarketing center phones would be classified as solicitors, and calls placed by those phones would be identified at the called party end as a solicitor.

Exceptions to Prohibited Uses of Autodialers or Artificial or Pre-Recorded Voice Messages

A. Prior Express Consent

The TCPA does allow the use of artificial or pre-recorded voice messages to call residential telephone lines if the called party has given their prior express consent. It is suggested that this prior express consent be allowed to be given at the time the called party is called by such devices. In other words, these systems should be allowed to call a residential telephone line and initiate a message to the called party designating the origin of the telephone call and asking the called party whether or not they wish to continue thus giving the requisite consent. It is further suggested that this method does not invade the privacy interests of the called parties and, in fact, offers a free choice in deciding whether or not to receive such calls. It also enables the telemarketing organizations to utilize the most effective and efficient methods for reaching their target markets. The problems associated with these systems not disconnecting from telephone lines are avoided, and the increased utilization of the "drop mode" can be averted.

B. Voice Messaging Services

Prior express consent for allowing artificial or pre-recorded voice messages to residential telephone lines should include the utilization of voice messaging services to deliver a message or greeting to a residential telephone line when the requesting party is one of the residents at that telephone number.

"Express consent" should also include instances where a business such as an airline reservation agency receives a call from a potential customer but has no live agents available at that moment, and therefore issues a message to the calling party that the business or airline reservation agency will return a subsequent call to the potential customer when a live agent becomes free. And, when the business or airline reservation agency does return the call, but a live agent who was formerly free to take the call is now again busy, the business or airline reservation agency should be allowed to place an artificial or pre-recorded voice message on the telephone line to the called party indicating that an agent will become free in a short time or that the call will be returned again at a later time. In essence, the original caller, by virtue of giving their telephone

number and name, has given prior express consent for the return call by the pre-recorded or artificial voice.

C. Implementing Regulations

On the issue of whether or not "autodialers" have the technical capacity to avoid calling prohibited telephone numbers, the industry generally utilizes systems which call a list of preselected telephone numbers. Thus, as a corollary, the same systems are capable of comparing their lists of preselected telephone numbers to dial with a list of prohibited telephone numbers.

D. Commercial Calls Not Transmitting an Advertisement

The Commission proposes to exempt from the prohibitions of Section 227 commercial messages that do not include the transmission of any unsolicited advertisement. It is suggested that the situation previously described wherein a potential customer who calls into a business such as an airline reservation system is instructed that no live agents are currently available but that the business or airline reservation agency will return the call at a later time should be exempted. The use of computerized or pre-recorded voice messages should be allowed in these situations when the telephone call to the potential customer is returned but for some reason or another the live agent that was previously available to take the outgoing call has now become unavailable and it is necessary to give the potential customer a message requesting them to hold for a short while or to wait for another return call.

E. Calls by Tax Exempt Nonprofit Organizations

Next, the Commission proposes an exemption from liability for artificial or pre-recorded voice messaging calls by tax exempt non-profit institutions. As noted in the Notice of Proposed Rulemaking, the TCPA does not specify whether such an exemption applies to these systems. However, the Commission is allowed to exempt by rule or order from the ban certain calls which come under the regulations of Section (2)(B). Section (2)(B)(i) states that an exemption may be allowed for calls that are not made for a commercial purpose. Tax exempt non-profit institutions should be allowed to use these systems to make calls since the types of calls made by such institutions are generally not for a "commercial purpose."

F. Calls to Former or Existing Clientele

Next, it is noted within the Notice of Proposed Rule Making that if a party already has chosen to do business with the particular caller, a contact by that caller to offer additional products or services is not as intrusive as a call from a

business with whom the called party has no relationship. Complaints have been generated more often for such calls that are labeled "cold contacts" to the called party. The TCPA includes an exception to the definition of telephone solicitations for calls to any person with whom the caller has an established business relationship. However, the prohibitions in the TCPA do not incorporate the term "telephone solicitation." Instead, the prohibitions refer to the "use of an artificial or pre-recorded voice to deliver a message." Thus, it has been left unclear whether or not calls to former or existing clientele offering additional products or services are or are not prohibited by the TCPA.

It is suggested that artificial or pre-recorded voice messages be allowed to contact former or existing clientele to offer such additional products or services, as these types of calls may be placed under the exemption in Section (2)(B)(ii) whereby such classes or categories of calls are allowed even though made for a commercial purpose, since calls to former or existing clientele will not adversely affect the privacy rights of the called party. These calls are not as intrusive as a "cold contact" in that these calls do not include unsolicited advertisements since the client has already approached the business and has established a "business relationship"; these clients have given their permission to be contacted as a result of the establishment of this "business relationship."

It is suggested that calls to former or existing clientele offering products or services related to the prior transactions between the two parties should definitely be allowed and exempted from the prohibitions of the TCPA since these are the types of products and services that a customer may wish to be notified of, and these categories of calls have been priorly consented to by the very nature of the original transaction which brought the two parties together. The former or existing customer is not as annoyed by such calls as from those originating from completely unknown entities.

It is also suggested that the organizations that have established a "business relationship" with a customer be allowed to use pre-recorded or computerized voice messaging systems to offer additional products and services to these customers. It is in the best interest of the calling organizations to foster a good "business relationship" with an existing customer since to lose such an existing customer is much more harmful to the business than to lose a "cold contact."

It has been noted within the legislative history for the TCPA that "local" businesses are not prone to initiating irritating solicitations to residential telephone lines in their local area since to do so would be very harmful to the business's reputation within the area. Such is the same analogy as the

utilization of pre-recorded or computerized voice messaging systems to contact former or existing customers.

In addition, the annoyance of these calls has been that the called party is powerless to respond or object to the computerized or artificial voice on the line. Prior solicitation methods have consisted of door-to-door salesmen and junk mail. A homeowner has always been able to verbally respond to a door-to-door salesman, and a person can simply throw away the junk mail. However, the computerized or pre-recorded voice continues on and on without allowing a response by the called party and without releasing the telephone line until the "voice" has finished.

Such annoying calls to former or existing clientele by business organizations will not be allowed since to do so would damage business reputations and relationships with the former or existing customer.

G. Debt Collection

With regard to businesses that conduct debt collection practices, this organization completely agrees that an exemption for debt collection calls should be exempted from the TCPA as noted within paragraphs 15 and 16 in the Notice of Proposed Rule Making.

Solicitations to Businesses

It is suggested that the use of an artificial or pre-recorded voice message in contacting businesses will not adversely affect privacy rights since businesses, by virtue reason for existing have impliedly consented to the offerance and acceptance of solicitations and other types of transactions. The restriction against autodialer calls to organizations concerned with the health or safety of the public and the prohibition against seizing multi-party lines within one business organization adequately protect businesses against the category of calls that would inhibit or prevent them from conducting their business, servicing their clients or acquiring new business. The TCPA and the legislative history have been less concerned with solicitations to businesses. The main concern of the TCPA is to restrict those practices which do prevent organizations from conducting their business, to prevent the impairment of health and safety services for the public and to prevent the invasion of privacy into the residential homes of the public. Thus, to add a prohibition against contacting businesses, within the scope of the TCPA as it is presently drafted, would simply restrict commerce and not promote any more privacy interests. Therefore, it is quite evident that the special protections for businesses under the TCPA are definitely adequate as they are written.

TELEPHONE SOLICITATIONS TO RESIDENTIAL SUBSCRIBERS

This organization completely agrees with the initial assessment by the FCC that it is not in the public interest to eliminate all residential telephone solicitations. This would eliminate one of the most efficient ways of contacting a target market in order for a business to sell its goods or services. To initiate such a ban would be equal to prohibiting the use of the U.S. mail system, television, radio or door-to-door salesman to reach customers since all of these methods, in one way or another, make their way into the home to reach their market. Moreover, the inefficiencies and increased costs which would result from such a prohibition would eventually be passed to the buying customer, thus passing the cost of this bill to the public, which has been specifically prohibited in the TCPA. Simply the very idea of placing such a restriction goes completely against the concept of a free market society and, again, places too much government regulation where government regulation has no business being. Government does not exist to police every action of the governed, but should only exist to ensure that individual rights are protected. By virtue of a person utilizing a telephone within their home, he has impliedly consented to these marketing strategies. Only when these marketing strategies unduly invade the privacy interests of the homeowner, is government intervention warranted. To restrict telephone solicitations further than has already been promulgated within the TCPA is not warranted under the circumstances.

REGULATORY ALTERNATIVES AVAILABLE TO RESTRICT TELEPHONE SOLICITATION

A. Databases

The compilation of a database of residential subscribers who object to receiving telephone solicitations might be an onerous task and an expensive proposition if not properly implemented. It is suggested that to produce and maintain such a database, a 1-800 service should be implemented whereby a residential telephone user may call the 1-800 number, which will respond via a voice recognition unit ("VRU") offering several options to the caller. The first option would be for the caller to place themselves into the "do not call" database; the second option would be for the caller to remove themselves from such database; a third option would allow the user to check whether or not their telephone number was included within the database; and, the last option would allow a caller to issue a complaint about a telemarketer who has continued to place phone calls to the caller's telephone number, even though the caller had placed themselves within the "do not call" database. The first three options could easily be handled between the VRU and the calling party by utilizing the touch tone features on a telephone.

Another method for controlling telemarketing calls is to use Voice Response systems with ANI to automatically maintain such a database for do-not-call numbers. Two nationwide 800 numbers would be provided for the add-delete service. By simply calling the first 800 number, you would automatically add your phone number to the National Do-not-call database. Calling the second 800 number would delete it.

The 1-800 aspect of the proposal maintains the mandate within the TCPA that the public should not bear the cost of implementing such a database system.

To enforce and pay for the cost of implementing a "do not call" database, a licensing system will be implemented whereby all telemarketing organizations must petition to the FCC for a license to conduct their telemarketing operations. Included within the regulations will be a requirement that the telemarketing organizations subscribe to a monthly update of the "do not call" list to ensure that the lag time between a request for placement upon the database list and the transfer of this information to the telemarketer is placed at a minimum. The license and update fees will not only help regulate the industry, but will also provide the income for implementing the database system.

As previously mentioned, this system allows for self-policing by the public, whereby notification of violators is done through the 1-800 number. If a licensed telemarketer continues to telephone a member of the "do not call" database list, either out of deliberate intention or because of a failure to maintain an updated list, these violations will be reported by the persons who have been inappropriately telephoned. In addition, those telemarketers who completely ignore the regulations and do not become licensed will also eventually be reported via the 1-800 number as they continue to telephone the public.

The main problem will be the dissemination of the monthly updates to the telemarketing organizations, since the telemarketers will essentially be required to utilize computers to maintain the updated lists. This harms the very small, low-budget telemarketers. The most efficient manner for dissemination of the updated list is the utilization of CD-ROMs which are capable of handling the most amount of data in an easily-mailed package. A second option would be the utilization of 3-1/2" or 5-1/4" floppy disks which do not contain nearly the storage capacity as the CD-ROMs, but are currently more widely utilized within the more common PC computer systems. Undoubtedly, most organized telemarketers utilize computerized systems to maintain their records and to conduct their telemarketing activities. Thus, the burden will not be as great for them. However, for the small, low-budget telemarketers, the utilization of computers with the capacity to accept CD-ROMs may be a prohibitive start-up

cost. Therefore, in order to accommodate such telemarketing organizations, a hard copy of the update list must be made available.

Current technology, including the advanced status of computer technology, allows such a database system to be implemented with a negligible bureaucracy since the 1-800 system and the attached computer will handle most of the work load. All that will be required, besides the normal supervision, will be the requirement for a battery of live agents sufficient to handle non touch-tone callers and those with complaints. An additional amount of labor will be required for providing the monthly updated material to the telemarketing organizations.

B. Special Directory Markings

Utilizing special directory markings will be too unwieldy and too costly to implement since every telemarketer within the United States who conducts interstate telemarketing will have to acquire every single local telephone book to maintain a list of telephone numbers that do not wish to be called.

C. Company-Generated "Do Not Call Me" Lists

The bureaucracy required to regulate such systems would be too immense, unwieldy, costly and ineffective.

D. Network Technologies

A couple of options are available and technically feasible at the present.

i) Option 1

Telemarketing organizations or centers could be placed into specific exchanges. The local telephone companies would then have the burden of notifying all their subscribers of the availability of accepting or not accepting certain classes of calls. This is similar to the "976" problem that has been easily solved using this method. Phone companies have the ability and the technology to implement such a system. Databases are already kept on "unlisted telephone numbers"; therefore, a database can also be maintained on "unsolicited telephone numbers."

ii) Option 2

The implementation of ISDN will eventually allow all telephones to identify the calling party's telephone number, provided the receiving telephone has an adequate means to display such a telephone number. Of course, there will be those who will wish to block the transmittal of their ID when making telephone calls. This can be circumvented by the telephone subscriber simply

optioning their telephone or telephone line to not receive "blocked" calls. Those telephones that do not have a means for displaying the calling party's telephone number may identify the calling party as a telemarketer by a different type or different combination of rings, such as a double ring.

Most probably the main obstacle in implementing either of these options is the local telephone companies themselves who will not wish to incur the costs in providing such systems without a cost benefit to themselves.

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